FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, *et al.*,

Appellant,

—against—

JOHN PLEASANT SIMS, *et al.*,

Appellees.

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND WESTCHESTER LEGAL SERVICES, INC.

CATHERINE P. MITCHELL, Esq.
Community Action for Legal Services, Inc., Louise Gruner Gans, of Counsel
335 Broadway
New York, New York 10013
(212) 431-7200

WESTCHESTER LEGAL SERVICES, INC.
Martin A. Schwartz, of Counsel
171 East Post Road
White Plains, New York 10601
(914) 949-4797

Attorneys for Amici Curiae

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In The

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No. 78-6

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BRIEF OF COMMUNITY ACTION
FOR LEGAL SERVICES, INC. and
WESTCHESTER LEGAL SERVICES, INC.
AMICI CURIAE

Community Action for Legal Services, Inc. ("CALS") respectfully submits its brief as amicus curiae to this Court. CALS is joined in this brief by Westchester Legal Services, Inc.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the

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*The letter(s) of consent have been filed with the Clerk of this Court.

National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court.

Approximately 20% of the cases handled

bu CALS' neighborhood legal services offices is in the area of family law. These cases include domestic relations matters, child protective proceedings, various foster care review proceedings, proceedings for termination of parental rights and adoption proceedings.

Since the inception of its program in 1967, CALS attorneys have provided representation to respondent parents charged with child abuse or child neglect in child protective proceedings (New York Family Court Act, Article 10) in the Family Court of the City of New York in at least 4,000 cases. CALS associated attorneys have handled many reported cases involving child protective proceedings and related areas of family law, including Smith v.

Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith 422 F. Supp. 460 (E.D.N.Y. 1976) aff'd, 547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M. 37 N.Y. 2d 622 (termination of parental rights); Matter of Orlando F. 40 N.Y. 2d 103 (1976) (termination of parental rights); Matter of Susan F. 59 A.D. 2d 783, 398 N.Y.S. 2d 903 (1977)(validity of retroactive extension of placement in child neglect proceedings); Matter of Daniel C. 47 A.D. 2d 160, 365 N.Y. S.Ct. 535 (illegal detention of children; standards and procedures for determination of child neglect); Matter of Hanson 51 A.D.

2d 696, 379 N.Y. S.Ct. 415.

Westchester Legal Services, Inc., is a non-profit corporation which is funded by the Federal Legal Services Corporation Act for the purpose of providing legal representation to low-income persons in civil cases. 42 U.S.C. Secs. 2996 et seq. The program has twelve regular staff attorneys, and operates offices in White Plains, Mount Vernon, New Rochelle, Peekskill and Yonkers, New York.

Attorneys associated with Amici Westchester Legal Services, Inc., have had extensive experience in child neglect proceedings, as well as other types of family litigation in the New York Family Court. Among the reported family law cases handled by Amici during the past decade are Matter of Ella B., 30 N.Y. 2d 352 (1972) (right to assigned counsel in child neglect proceeding); Bennet v.

Jeffreys, 40 N.Y.2d 543 (1976); Matter of Peters, 67 Misc.2d 498 (Fam.Ct. West Co. 1971) (Burden of Proof in child neglect proceeding); People ex. rel. A.Amandola v. Jackson, 74 Misc.2d 797(Sup.Ct.West.Co. 1973) (right to assigned counsel in support-contempt proceeding); People ex. rel. Magnero v. Jackson, 73 Misc.2d 740 (Sup. Ct. West. Co. 1973) (right to counsel in family offense-contempt proceeding); Wynn v. Family Court, 8 Clearinghouse Review 301 (1974) (consent decree; right to a prompt hearing after emergency removal of child from parent).

In the course of their extensive experience with child protective proceedings Amici have frequently encountered the practice of summary removal of children from their homes at the time of or prior to the filing of a petition alleging child

abuse or child neglect and have been disturbed both by the laxity of legal procedure which characterizes such removals and by the devastating human suffering which is caused by these emergency measures.

While there are naturally many differences between the statutory schemes which govern child protective proceedings in Texas and New York, respectively, the procedure provided for emergency preliminary removal of children in New York corresponds in several important respects to the Texas procedures under review on this appeal.*

As in Texas, New York permits summary removal of children prior to or at the time of commencement of child protective proceedings on the basis of a court order issued ex parte. Parents do not have to

*New York Family Court Act Article 10, Secs. 1022-1028; 1031, 1035, 1036, 1041. Title 2 Texas Family Code Chapters 17 and 11.

be notified that the order will be sought; proof of efforts to notify parents is not required, nor need the parents be served with the removal order after it is made, N.Y.F.C.A.*Secs. 1022-1027; Texas Family Code Secs. 17.02-17.05. As in Texas, the ex parte order of removal is signed neither on the basis of sworn affidavits nor sworn testimony. In Amici's experience, the issuance of the order is purely a "rubber stamping" procedure. N.Y.F.C.A. Secs. 1022-1023,1027.

New York statutes, like those of Texas, do not require the state to provide adequate notice to the parents and to hold a full adversary hearing on the need for removal, promptly following the entry of the ex parte removal order. In New York, as in Texas, once a child has been removed from his or her parents, the burden is on the parents to demand a hearing for the return of the child, although parents are

*New York Family Court Act.

not informed that such a hearing may be requested. N.Y.F.C.A., Secs. 1027-1028, Texas Family Code Secs. 17.02-17.06.*

Amici have found that parents charged with child neglect are rarely served with process and with a copy of the petition either shortly after the commencement of child protective proceedings or at any meaningful time. Secs. 1035(b)-1036(b).

While long aware of and concerned with the constitutional propriety of these procedures, Amici have found the legal issues surrounding preliminary seizure of children from their homes to be extremely difficult to litigate. As in Texas, the alleged illegality of the summary seizure of a child cannot be raised as a defense to the child protective proceeding, interlocutory appeals are rarely

*All references to Texas Family Code are to its Title 2 provisions.

available* and once a hearing has been held, the issue of removal becomes moot.

In addition, most parents do not secure counsel till considerably after the child has been removed. So detrimental is the effect of involuntary separation of parents and children that by the time counsel is obtained, concentration must be on the efforts to secure a return of the child as quickly as possible.

Accordingly, Amici submit their brief, focusing the Court's attention on selected

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*They are permitted in abuse but not neglect cases N.Y.F.C.A. Secs. 1012, 1112; however, abuse was alleged in only 20% of the cases processed. State of New York, Twenty-Third Annual Report of the Judicial Conference & Office of Court Administration, 1978, 270 Broadway, New York, N.Y. pp. 39-41.

issues raised by this appeal, because of their concern about the very direct impact of this case on their clients.

QUESTIONS PRESENTED

1. Whether in light of this Court's decision in Younger v Harris, 401 U.S. 37, the district court properly granted injunctive relief against those aspects of Texas child protective proceedings, which authorized summary ex parte removal of the Sims children from their parents and home?

2. Whether Texas Family Code, Chapter 17, Secs. 17.02, 17.03, 17.05, 17.06 and Texas Family Code, Chapter 11, Sec. 11.11(a)(4) violate the due process clause of the Fourteenth Amendment to the Constitution of the United States insofar as they authorize the summary seizure of children from their parents, pursuant to an ex parte court order without requiring (a) that efforts be made to serve notice of the ex parte application on the parents; (b) without requiring that the ex parte removal hearing be held on

the day the child was seized; and (c) without requiring that the state hold an adversary hearing on the propriety of the seizure on adequate notice to the parents, no later than 10 days after the initial seizure of the child?

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case involving a challenge by Appellees parents upon the constitutionality of state procedures under the Texas child abuse and neblect reporting system, the Texas proceeding for the summary emergency removal of an allegedly abused and neglected child from parents and home, and the Texas "Suit Affecting the Parent-Child Relationship." The district court found that certain of the

challenged Texas procedures did in fact offend due process.

Amici do not submit this brief in order to present the Court with exhaustive argument on every aspect of this case. Amici in this brief have briefed certain issues relating to the summary seizure of children from their parents without prior notice and hearing. The issues selected are those with which Amici have had the most experience.

I

The Court below correctly concluded that the doctrine of Younger v. Harris,401 U.S. 37, is inapplicable to the relief it granted against the procedures for summary removal of a child from the home, because there were no pending state court proceedings in which plaintiffs could have presented their con-

stitutional claims by way of defense. Plaintiffs could not have raised these claims as a defense to the Juvenile Court proceedings pursuant to Chapter 17 because they were not entitled to notice of that proceedings,Sec. 17.03. The only issue relevant on a parent's motion to modify is "the best interest of the child," Section 17.06. No notice was given to parents of the proceeding pursuant to Chapter 11 which followed. Thus, during the entire period that plaintiffs were deprived of their children, there was no opportunity for them to litigate their constitutional claims. Moreover, once the duration of the ex-parte deprivation of custody ended, the constitutional issue became moot. In any event, federal relief against the initial ex-parte proeedures

will not directly interfere with the state adjudicatory hearing.

II

When Texas state officials seized the Sims children, obtained an ex-parte order of seizure and thereafter detained the children for 42 days without providing their parents with notice and hearing, they interfered with constitutionally protected reciprocal familial rights of parents and children. Stanley v. Illinois, 405 U.S. 645, held that due process applied to state coerced removal of children from their parents,and, that parents must have notice and a hearing before their child can be taken from them.

Nevertheless, summary seizure has been allowed in extraordinary situations such as are presented by imminent danger to a

child's life or health. In case of such danger the state should be able to provide the child with immediate protection.But after seizure, the interests of parents and children in not being arbitrarily separated becomes paramount. The separation of parents and children is traumatic to all, is very harmful to children and there is a high risk of error in emergency decisions. Accordingly, procedures immediately following summary seizure of a child should confirm promptly, applying high standards of procedural protection, whether the seizure was necessary. The detailed procedural requirements described by the district court were appropriate to the case.

ARGUMENT

I.

YOUNGER V. HARRIS WAS INAPPLICABLE TO THE TEMPORARY REMOVAL OF CHILDREN FROM THE HOME BECAUSE THE PARENTS HAD NO OPPORTUNITY TO RAISE THEIR CONSTITUTIONAL CLAIMS IN THE SUMMARY, EX PARTE PROCEEDING THAT AUTHORIZED THE REMOVAL.

The court below granted relief against various aspects of Texas' child abuse proceedings. Amici will only discuss the applicability of the doctrine of Younger v. Harris, 401 U.S. 37 (1971) to the relief granted by the court below against the procedures authorizing the temporary removal of a child from the home. (Texas Family Code, Chapter 11, Sec. 11.11(a)(4)). Amici will focus on those procedures because they involve a drastic infringement upon constitutionally protected rights and yet are particularly resistant to review by state courts.

It is Amici's position that the court below correctly concluded that the Younger doctrine is inapplicable to this relief because during the period of the temporary removal of plaintiffs' children from their home, there was no pending state court proceeding in which plaintiffs could have presented their constitutional claims.

The Younger policy of equitable restraint "is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." Kugler v. Helfant, 421 U.S. 117, 124 (1975). This court has held that when the pending state proceeding provides a fair opportunity to litigate federal constitutional issues, federal interference not only interferes with the state adjudicatory process but it also

results in duplicative legal proceedings and may reflect negatively on the state court's ability to enforce the Constitution. Judice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, 1218 (1977); Huffman v. Pursue, 420 U.S. 592, 604 (1975); Younger v. Harris, supra at 43. According to this rationale, the essential predicate of Younger is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Huffman v. Pursue, supra at 594; Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

This Court has thus ruled that the Younger "principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'" Steffel v. Thompson, 415 U.S. 452, 462 (1974); Lake Carriers Association v. MacMullan, 406 U.S. 498, 509 (1972). See also, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Allee v. Medrano,

416 U.S. 802, 814 (1974). When no state court proceeding is pending, federal relief will not interfere with the state judicial system; it "does not result in duplicative legal proceedings" and it cannot "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." Steffel v. Thompson, supra at 462.

For these same reasons, this Court has determined Younger to be inapplicable when the constitutional claim could not fairly be raised as a defense to the pending state proceeding. Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975); Gibson v. Berryhill, supra. In Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911, 1920 (1977), this Court remanded the action to the district court in order to specifically determine whether

the constitutional claims could have been presented in the pending state proceeding. See also, Trainor v. Hernandez, 97 S. Ct. supra at 1930 (Stevens, J., dissenting).

The constitutional claims asserted against the emergency removal procedures could not have been raised as a defense to the pending Juvenile Court proceedings. The contested state provisions authorize the removal of a child for a 10-day period upon the filing of a petition without notice to the parents. Texas Family Code, Sec. 17.01 - 17.05. While the contested provisions provide that a parent may make a motion to modify the emergency order, Texas Family Code, Sec. 17.06, this remedy does not provide an adequate remedy to raise the constitutional issues because (1) the parent has received neither notice of the ex parte proceeding or the availability of relief pursuant to section

17.06, and (2) the only issue relevant on such a motion is "the best interest of the child." Texas Family Code, Sec. 17.06.

Even if state law authorized the court to determine the procedural due process question, a motion to modify an emergency order is not an appropriate vehicle to litigate constitutional issues. Since the child has been removed from the home under allegedly emergency circumstances, the essential if not sole inquiry at this stage must be the proper placement of the child rather than resolution of any constitutional question.

The Court below found that:

> "(i)t is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County." Sims v. Department of Public Welfare, 438 F. Supp. 1179, 1184 (S.D. Tex. 1977).

Thus, during this entire period in which plaintiffs were deprived custody of their children, there was no pending state proceeding in which constitutional claims could have been litigated. As the three-judge court concluded in Newton v. Burgin, 363 F. Supp. 782, 785 (W.D. N.C. 1973), aff'd, 414 U.S. 1139 (1974):

> "This five-day separation is clearly an injury to the parent which occurs before he or she has a chance to defend his or her right to custody in a civil proceeding, and it is an injury which occurs regardless of the outcome to the civil proceeding."*

The Court in Newton thus found that Younger was inapplicable.

Moreover, once the duration of the ex parte deprivation of custody ends and the plenary "suit affecting the parent-child relationship" has commenced, the injury the plaintiffs are complaining about, i.e., the deprivation of custody without a prompt hearing, will have occurred and the constitutional issue will be moot. See Trainor v. Hernandez, 97 S.Ct. supra at

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*The summary removal of a child from his or her natural parents may also cause the child irreparable injury. Roe v. Conn, 417 F. Supp. 769, 776 (N.D. Ala. 1976) three-judge court). See Point II, infra.

1930 (Stevens, dissenting). Developments of the Law - Section 1983 and Federalism, 90 Harvard Law Review, 1135, 1319 n252 (1977). Therefore, the constitutionality of the ex parte removal procedures cannot be raised as a defense to the plenary action. Amici and other legal services attorneys have experienced similar difficulties and frustrations in attempting to litigate their constitutional claims in the context of Family Court proceedings. The lower federal courts have correctly ruled that when the family or juvenile court proceeding does not provide an adequate opportunity to litigate the constitutional issue, the principles of Younger do not preclude federal court relief. Alsager v. District Court, 518 F.2d 1160, 1166

(8th Cir. 1975); Cleaver v. Wilcox, 499 F.2d 940, 943-944 (9th Cir. 1974); Conover v. Montemuro, 477 F.2d 1073, 1080-1082 (3d Cir. 1973); Doe v. Maher, 414 F.Supp. 1368, 1376-1377 (D. Conn. 1976), vacated and remanded, 97 S.Ct. 2474 (1977); Newton v. Burgin, 363 F.Supp. 782 (W.D. N.C. 1973), aff'd, 414 U.S. 1139 (1974).

In addition to the fact that the pending state proceeding does not provide an adequate opportunity to litigate the federal constitutional issues, federal relief will not directly interfere with the state adjudicatory hearing, but only with the initial ex parte procedures. See Gerstein v. Pugh, 426 U.S. 103, 108 n.9 (1975); Fuentes v. Shevin, 407 U.S. 67, 71 n.3 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Conover v.

Montemuro, 477 F.2d 1073, 1080-1082, (3d Cir. 1973); Developments in the Law - Section 1983 and Federalism, 90 Harv. L. Rev. 1135, 1318-1321 (1977). In Conover v. Montemuro, supra, the Third Circuit ruled that Younger principles did not bar federal court relief against juvenile delinquency intake procedures because "relief with respect to the intake procedures will not necessarily hinder the eventual adjudicatory process of the (state) Court...." Id. at 1082. Similarly, in the instant case, federal relief against the ex parte removal procedure will not interfere with the Juvenile Court child abuse prosecution.

This Court's decision in Trainor v. Hernandez, supra, is not inapposite. In that case, the Court concluded that the contested order of attachment was "very

much part of the underlying action for fraud." Trainor v. Hernandez, 97 S.Ct. supra at 1919 n. 9. The attachment was necessary in order to insure that there be assets available should the state court plaintiff obtain a judgment. The attachment was thus closely related to the effectuation of the final judgment. In the instant case, the initial ex parte emergency removal, analytically, is not entwined with the final judgment.

Even if plaintiffs' constitutional claims could have been litigated in a state court habeas corpus proceeding, this would have no relevancy to the Younger issue. Younger presupposes the ability to fairly litigate the federal constitutional

issues in the pending state proceeding.* It does not require a party to institute a separate proceeding. See Newton v. Burgin, supra at 785. Requiring the institution of state judicial proceedings in order to litigate a constitutional claim in effect would require the federal court plaintiff to exhaust state judicial remedies, Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). This would be contrary to the well established rule that exhaustion of these State judicial remedies is not required in order to commence a Section 1983 action. Monroe v. Pape, 365 U.S. 167, 183 (1961). Accord, Ellis v.

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*In fact, the Court below found that this remedy was unavailable to plaintiffs Id. 438 F.Supp. 1179 at 1184.

Dyson, 421 U.S. 426, 432-433 (1975); Steffel v. Thompson, supra at 472-473.

In sum, because there was no pending state proceeding in which plaintiffs' constitutional claims could be raised, the Court below correctly held that Younger did not bar it from granting procedural due process relief against the provisions of Texas law authorizing the ex parte removal of the children.

II

THE TEXAS PROCEDURES (TEXAS FAMILY CODE, CHAPTER 17 and 11.11(a)(4)) GOVERNING EMERGENCY SEIZURE OF ALLEGEDLY ABUSED OR NEGLECTED CHILDREN FROM THEIR PARENTS VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

When Texas state officials seized the Sims children, secured an ex-parte court order and subsequently detained the children for 42 days without providing their parents with notice and hearing, they drastically interfered with "a basic liberty" fundamental to the very existence of the human race, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Indeed, "freedom of personal choice in matters of marriage and family life" Cleveland Board of Education v. La Fleur, 414 U.S. 632, has a preeminent place in a constitutional order. An aspect of that freedom, the right of parents to "conceive and raise children" Meyer v Nebraska,

290 U.S. 390, to enjoy their "care, custody and companionship," May v Anderson, 345 U.S. 528, has repeatedly been recognized by this Court, Meyer v Nebraska, supra, May v Anderson, supra; Pierce v Society of Sisters, 268 U.S. 510; Armstrong v Manzo, 380 U.S. 545; Stanley v Illinois, 405 U.S. 645; Wisconsin v Yoder, 406 U.S. 205. Important interests of children are implicated as well, as they are perceived to have a reciprocal right to their parents' care and companion-

ship, Duchesne v Sugarman, 566 F. 2d 817, 825, (2d) Cir. 1977).* Moreover, while its proper purpose may be protection of the child from harm, the experience of summary seizure of a child is akin to arrest. Id at 828 fn. 24.

*This reciprocal complex of rights, apparently following upon this Court's reference to "the integrity of the family unit" in Stanley v Illinois, 405 U.S. 651, is sometimes referred to as the right to 'family integrity.' Cf. Alsager District Court of Polk County Iowa, 406 F. Supp. 10 (S.D. Iowa 1975) aff'd 545 F. 2d 1147 (8th Cir 1976); Roe v Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976); Duchesne v Sugarman 566 F. 2d 817, 824, (2d Cir 1977). It is protected as liberty by the due process clause of the Fourteenth Amendment, Meyer v Nebraska, supra, at 399; under the principle of privacy, Griswold v Connecticut, 381 U.S. 479 (1965), Roe v Wade, 410 U.S. 113 (1973), Eisenstadt v Baird, 405 U.S. 438 (1972); and by the equal protection clause of the Fourteenth Amendment, Stanley v Illinois, supra.

There is thus no question as to the applicability of the due process clause to state coerced removal of children from their parents' custody. In Stanley v Illinois, supra, this Court, while acknowledging the state's right to protect minor children through judicial child neglect proceedings, specifically held both that due process clause was applicable and that it requires that parents be provided with notice and hearing on their "fitness" prior to the taking of their child by the state. That holding is not in question in this case. Stanley was concerned with the necessity for and timing of a hearing on the merits in cases where the ultimate relief was to be the taking of a child from his or her parents.

The question here is whether and by what process the state can detain a child, from his parents summarily and independently of the eventual determination of a child protective case on the merits*

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*Neither in Texas nor in New York does a finding of abuse or neglect necessarily result in the separation of a child from his parents. See Texas Family Code, Chapter 14 ; N.Y.F.C.A. Sec. 1052-1057. In New York in 1977 and 1976, only 28% and 30% of cases involving abuse resulted in placement of the child away from home. State of New York, Report of the Judicial Conference and Office of Court Administration 1978, p 43; 1977 pp 39-40.

While the summary seizure of a child at or prior to the actual commencement of proceedings charging parents with child abuse or neglect without either notice or prior hearing clearly deviates from the rationale of the Stanley case, it is difficult to argue that due process totally prohibits summary seizure of a child in child protective cases. This Court has allowed that "(t)here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing." Fuentes v Shevin, 407 U.S. 67, 90. Further, protection of children from imminent death, disfigurement or other form of extreme physical injury is an "important governmental interest" Fuentes v Shevin, supra at 91. See also Newton v Burgin, 363 F.

Supp. 782, 786 (W.D.N.C. 1973) aff'd 414 U.S. 1139 (1974). Hence, Amici agree with the parties and Court below that "where real, immediate and irreparable physical harm is likely the state has an interest in taking so-called 'emergency' possession of the children." Sims v State Department of Public Welfare, 438 F. Supp. 1179, 1189-90 (S.D. Texas 1977).

Because they involve serious deviations from due process norms, this Court has held in cases of summary seizure of property interests that the occasions for such seizures "must be truly unusual" Fuentes v Shevin, supra, at p 90, and that the need for the seizure be determined "under the standards of a narrowly drawn statute." Id at

p 91. In North Georgia Finishing v Di Chem, Inc., 419 U.S. 601, a summary seizure case involving pre-judgment garnishment without prior notice and hearing, this Court noted as a defect the absence of a "provision for an early hearing at which the creditors would be required to demonstrats at least probable cause for the garnishment." Id at 607. At least as much should be required in cases of summary seizure of children.

The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental purpose involved and the private interests affected. Cafeteria Workers v McElroy, 367 U.S. 886,895 (1961); Goldberg v Kelly, 397 U.S. 254, 263-266 (1970). In the context

of the summary seizure of children in this case, Texas' interest is in being able to protect children "in immediate danger" of abuse as quickly as possible. That interest is immediately and entirely satisfied when Texas public officials take possession of a child without any handicapping barriers, as they are authorized to do by Texas Family Code Section 17.01. However, as soon as the child is in the state's protective custody, the powerful countervailing interests of parents and children,in not being arbitrarily or improvidently or mistakenly separated, become predominant.

It would be wrong to presume that an emergency seizure intended to protect a child from harm is inevitably beneficial. On the contrary, there is growing revulsion among legal as well as child welfare

professionals against excessive resort to such seizures. Removal is recommended only as a last resort, because of its tremendous potential harm to the child, Roe v Conn, 417 F. Supp. 769, 776-777 (M.D. Ala. 1976). See also Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stanford Law Review 985 (April 1975); American Bar Association, Juvenile Justice Standards, Standards Relating to Abuse and Neglect (Tentative Draft 1977) pp 78-88; R. Bourne and E. H. Newberger, "Family Autonomy" or "Coercive Intervention" 57 Boston University Law Review 670, p 689 (No. 4 July 1977); McCathren, Accountability in the Child Protection System, 57 Boston University Law Review 707, pp 710-711 (No. 4 July 1977).

Sudden involuntary and unexpected

separation of a child from his parents, even for a short period of time, is a terrifying experience for any child. Young "Placement from the Child's View," 31 Social Casework (1950); Bowlby, Maternal Care and Mental Health, Monograph No. 2, World Health Organization, 1952. Amici can attest from their own experience with their clients that also for parents the process of having one's child precipitously removed is an extremely traumatic experience. Cf. S. Jenkins & E. Norman, Filial Deprivation and Foster Care (1972).

Because of their indeterminate and subjective nature, the risk of error inherent in both social work and judicial child placement decisions is high. Phillips, et al.,Factors Associated with

Placement Decisions in Child Welfare (Child Welfare League of America 1971); Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy 39 Law & Contemporary Problems 226 (1975); Levine, Caveat Parens A Demystification of the Child Protection Process, 35 University of Pittsburgh Law Review 1 (1973). Racial and class bias often play a substantial role in these decisions, Levine, supra, Roe v Conn, supra.

In the case of a summary seizure of a child, the risks of improvident action are dramatically increased. In Amici's experience, the amount and quality of the hastily assembled information relied on as a basis for the summary seizure of a child is frequently low. Title 2 Texas Family Code Secs. 34.05(d) acknow-

ledges by its terms that summary removal may be resorted to "before the investigation is complete."

The experience in New York where, as in Texas, summary removal is based on "imminent danger to life or health," N.Y.F.C.A. Sec. 1027, supports this analysis. Of 4,916 child abuse or neglect proceedings, disposed of in New York in 1977, a finding of child abuse was made in 6% of the cases filed. In 44% of the cases, neither abuse nor neglect was found. Of the 920 children who were the subject of child abuse petitions, 55% were temporarily removed from their homes. Temporary removal ended with respect to 73% of the children removed within 90 days, and only 30% of the child abuse cases disposed of in

1977 ultimately resulted in placement outside the home. State of New York, Twenty-third Annual Report of the Judicial Conference and the Office of Court Administration, 1978, pp 39-43, 270 Broadway, New York, N.Y. 10007. The experience in 1976 was virtually identical to 1977. State of New York, Twenty-second Annual Report of the Judicial Conference and Office of Court Administration, 1977, pp 37-40.

A higher level of procedural protection in the summary seizure process is required here than in cases involving "merely shifting economic arrangements" Stanley v Illinois, 405 U.S. 645, 650-651

(quoting from Kovacs v Cooper, 336 U.S. 77, 95 (concurring opinion).)

Because the deprivation caused by the summary seizure of a child is so severe and the risks of an erroneous deprivation so high, the procedural protections provided by the state immediately after the seizure of the child should be designed to confirm as quickly as possible that the summary seizure "was necessary and justified in the particular instance" Fuentes v Shevin, supra, at 91, or that the child should be returned home promptly pending a hearing on the merits of any underlying child protective proceeding. A factually reliable decision as to the propriety of the removal as quickly as possible is in the state's interest as well, since it does not wish to separate and traumatize families unnecessarily, and

if financial considerations are relevant in this context, cf. Mathews v Eldridge, 424 U.S. 319, because the cost of foster care is exorbitant. See Fanshel, Dollars and Sense in the Foster Care of Children (Child Welfare League of America 1971).

Sections 17.01, 17.02 and 17.03 of the Texas Family Code require that immediately after a child is summarily seized by public officials, the child be brought before a court and that a petition for "protection of child in emergency" be filed at the same time. While Section 17.02 provides for a hearing to be held upon the filing of the petition, it does not specify exactly when the hearing is to be held; Section 17.03 provides that the hearing may be held without notice to the child's

parents.

The district court held that while the preliminary hearing on the child's seizure could be held ex parte, due process required that the state at least make reasonable efforts to notify the parents of this judicial review of the child's detention and that the hearing be held on "the very day" of the child's seizure, Sims v State Department of Public Welfare, supra, pp 1192-1193.

Appellants do not contest the notice requirement, but claim that due process does not require them to seek judicial approval of their seizure of a child on the very day of the seizure.

Amici believe that judicial review of the summary seizure of a child should be held at the earliest possible time.

The inherent danger of careless or erroneous use of emergency custody demands that such action be examined by a court as quickly as possible. One of the dangers -- that no legal action will be taken at all following the seizure of the child -- is illustrated by disturbing cases from several jurisdictions, Duchesne v Sugarman, 566 F. 2d 817 (2d Cir. 1977), In re Guardianship of Denlow, 384 N.Y.S. 2d 621__Misc. 2d__ (Fam. Ct. Kings County 1976), People ex. rel. Johnson v Michael, 39 Misc. 2d 365 (S. Ct. N.Y. Co. 1963), White v Minter, 330 F. Supp. 1194 (D. Mass. 1971), In re Willis, 207 W.E. 2d 129 (W. Va. Sup.Ct. 1973).

In Mitchell v W. T. Grant, 416 U.S. 600, this Court recognized that "judicial control of the process from beginning to end" would "minimize the risk that the ex parte seizure will lead to a wrongful taking." Id at 616-617. Significantly, the American Bar Association Juvenile Justice Standards Relating to Abuse and Neglect (Tentative Draft 1977) provide for a court review to determine whether emergency custody of a child should be continued on the first business day after the child is taken into custody or no later than the next business day. Standard 4.2.B and 4.3 pp 85-86.

It is difficult to argue meaningfully about the merits of "the very day" as opposed to the next business day. What is clear is that there must be a definite and very short limit on the time the state can hold a child without going to court. In the absence of such a limit, it cannot be assumed that unwarranted assumption of emergency custody will be noticed and terminated with all possible speed.

Despite their extensive experience with child protective cases, Amici have never known a Family or Juvenile Court judge to refuse to issue an ex parte removal order. The pressure to sign the order is enormous. One commentator reports on the practice of "shroudwaving." If a judge is reluctant to sign a removal

order, he is told "O.K.! Don't sign the order! But if the kid is brought in dead, don't blame us!"
Levine, Caveat Parens, supra, at p29 fn 148.

Because of the peculiar pressure on the Juvenile Judge confronted with an ex parte removal order, Amici believe that ex parte "judicial control" is less of a safeguard in child protective cases than in cases involving commercial interests, Mitchell v W.T. Grant, supra. Other safeguards, such as "an affidavit going beyond mere conclusory allegations and clearly setting out the facts," Id at 607, forming the basis of the summary seizure should be required. Further, it should be clear that even the ex parte "hearing" involves the taking of sworn testimony rather than merely the handing

up of papers for signature. State officers or representatives confronted with the requirement to produce facts from the very beginning would have to scrutinize more carefully the need for summary seizure. Whether or not the child's parents have received actual notice of the preliminary hearing pursuant to Section 17.02, they surely should be served with a copy of the removal order itself.

The ex parte removal order pursuant to Section 17.02 has a duration of 10 days only, according to Section 17.05. During these 10 days, a parent may move to modify the preliminary ex parte removal order. At the expiration of the 10-day period, if the state commences a plenary proceeding "affecting the parent-child relationship" pursuant to Chapter 11, the

state may obtain an additional 10-day ex parte removal order pursuant to Section 11.11(a)(4). The district court held that this scheme offended due process because it failed to provide parents a prompt adversary hearing on the propriety of the children's seizure and placed the burden of modifying the ex parte removal order on the parents.

The summary seizure of a child followed by an ex parte hearing provides parents no opportunity to be heard in opposition to the summary seizure of their child. But "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... (And n)o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and

opportunity to meet it" Joint-Anti-Fascist Refugee Committee v McGrath, 341 U.S. 123, 170-172 (Frankfurter, J. concurring).

Not having provided the parent with any opportunity to prevent deprivation through the initial seizure process, notice and hearing on the propriety of the seizure must be granted so that the deprivation can still be limited or minimized. If arbitrary or erroneous deprivation through the summary seizure process is to be avoided, such a hearing must be held at a "meaningful time" Armstrong v Manzo, 380 U.S. 545, 552, that is within the shortest practicable time after the deprivation.

In Amici's experience, the fact that the parent may move to modify the ex parte removal order is of no moment. Amici have found that motions to modify are rarely made: parents simply do not know about them, and children remain in state custody on the basis of ex parte orders for substantial periods of time.

"In this situation, the state cannot constitutionally "sit back and wait" for the parent to institute judicial proceedings. It "cannot...(adopt) for itself an attitude of 'if you don't like it, sue.'" Kimbrough v. O'Neil, 523 F.2d 1056, 1060 n.3 (7th Cir. 1975) (Swygert, J., concurring). The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time. Cf. Fuentes v. Shevin, 407 U.S. 67, 83 n.13 (1972); Hernandez v. European Auto Collision, Inc., 487 F 2d 378, 385 n.4 (2d Cir. 1973) (Timbers, J. concurring)." Duchesne v.

Sugarman, 566 F2d 817, 828 (2d Cir. 1977).

The district court properly concluded that as a matter of due process, having summarily seized a child and secured an ex parte order of removal, the state must provide the parent with an adversary hearing on the propriety of the seizure no later than 10 days after the seizure of the child.

CONCLUSION

The judgment of United States District Court for the Southern District of Texas, Houston Division, should be affirmed.

Respectfully submitted,

CATHERINE P. MITCHELL
COMMUNITY ACTION FOR LEGAL SERVICES, INC.
Louise Gruner Gans,
of Counsel
355 Broadway
New York, N.Y. 10013
(212) 431-7200

WESTCHESTER LEGAL SERVICES, INC.
Martin A. Schwartz,
of Counsel
171 East Post Road
White Plains, N.Y. 10601
(914) 949-4797

Attorneys for AMICI CURIAE